

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Richard H. Tholen, M.D.,

Civil No. 17-3919 (DWF/SER)

Plaintiff,

v.

**ORDER ADOPTING REPORT  
AND RECOMMENDATION**

Assist America, Inc.,

Defendant.

This matter is before the Court upon Defendant Assist America, Inc.’s (“Defendant”) objections (Doc. No. 259) to Magistrate Judge Steven E. Rau’s April 18, 2019 Report and Recommendation (Doc. No. 247) insofar as it recommends that Defendant be sanctioned as follows: (1) Assist America’s failure will give rise to the adverse inference that Assist America’s operations manual in effect at the time of Dr. Tholen’s incident provided insufficient information to properly decide whether to evacuate an Assist America member; (2) Assist America’s failure will give rise to the adverse inference that Assist America’s operations manual in effect at the time of Dr. Tholen’s incident provided insufficient information to properly decide whether an Assist America member was receiving appropriate medical care; (3) Assist America’s failure will give rise to the adverse inference that Assist America’s operations manual in effect at the time of Dr. Tholen’s incident was not sufficiently disseminated to its employees, depriving the employees of guidance from Assist America to properly decide whether to evacuate an Assist America member; (4) Assist America’s failure will give

rise to the adverse inference that Assist America's operations manual in effect at the time of Dr. Tholen's incident was not sufficiently disseminated to its employees, depriving the employees of guidance from Assist America to properly decide whether an Assist America member was receiving appropriate medical care; and (5) Assist America's failure will give rise to the adverse inference that Assist America has now altered its operations manual as a result of Dr. Tholen's incident. Plaintiff filed a response in opposition to Defendant's objections on May 20, 2019, (Doc. Nos. 263, 264), and a Declaration of Patrick M. Arenz in Support of Plaintiff's Response in Opposition to Defendant's Objection to Report and Recommendation. (Doc. No. 264.)

The Court has conducted a *de novo* review of the record, including a review of the arguments and submissions of counsel, pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.2(b). The factual background for the above-entitled matter is clearly and precisely set forth in the Report and Recommendation and is incorporated by reference for purposes of Defendant's objections.

Based upon the *de novo* review of the record and all of the arguments and submissions of the parties and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

### **ORDER**

1. Defendant Assist America, Inc.'s objections (Doc. No. [259]) to Magistrate Judge Steven E. Rau's April 19, 2019 Report and Recommendation are **OVERRULED**.

2. Magistrate Judge Steven E. Rau's April 19, 2019 Report and Recommendation (Doc. No. [247]) is **ADOPTED**.

Accordingly, **IT IS HEREBY ORDERED** that Assist America is sanctioned as follows:

3. Assist America's failure will give rise to the adverse inference that Assist America's operations manual in effect at the time of Dr. Tholen's incident provided insufficient information to properly decide whether to evacuate an Assist America member.

4. Assist America's failure will give rise to the adverse inference that Assist America's operations manual in effect at the time of Dr. Tholen's incident provided insufficient information to properly decide whether an Assist America member was receiving appropriate medical care.

5. Assist America's failure will give rise to the adverse inference that Assist America's operations manual in effect at the time of Dr. Tholen's incident was not sufficiently disseminated to its employees, depriving the employees of guidance from Assist America to properly decide whether to evacuate an Assist America member.

6. Assist America's failure will give rise to the adverse inference that Assist America's operations manual in effect at the time of Dr. Tholen's incident was not sufficiently disseminated to its employees, depriving the employees of guidance from Assist America to properly decide whether an Assist America member was receiving appropriate medical care.

7. Assist America's failure will give rise to the adverse inference that Assist America has now altered its operations manual as a result of Dr. Tholen's incident.

8. The Court will address at the pretrial hearing the content of and timing for when instructions relating to these adverse inferences should be given to the jury, including the Court's analysis pursuant to Article 4 of the Federal Rules of Evidence.

Dated: June 6, 2019

s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge